Public Bank Bhd & Anor v Fung Shaw Yiew @ Jellfer & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-01(NCVC)(W)-379–08 OF 2020 AND S-01(NCVC)(W)-390–08 OF 2020
LEE SWEE SENG, SUPANG LIAN AND AZIMAH OMAR JJCA
19 OCTOBER 2023

Land Law — Indefeasibility of title and interests — Forged transfer — Plaintiffs claimed first defendant unlawfully transferred share of property and created charge as security for loan from third defendant — Third defendant pleaded bona fide chargee — Whether plaintiffs had discharged their burden of proof on balance of probabilities that they had never signed memorandum of transfer and that plaintiffs' shares on property had been unlawfully transferred to first defendant without plaintiffs' knowledge by way of forged signatures — Whether third defendant was bona fide subsequent chargee for valuable consideration

These two appeals concerned a claim by two co-beneficiaries ('the plaintiffs') against another co-beneficiary ('the first defendant') of a property left by their deceased father ('the property'). The plaintiffs and the first defendant were siblings. They had two other sisters ie Lily and Suzie. After their father passed away, the plaintiffs, the first defendant, Lily and Suzie were registered as equal co-owners of 1/5 share each of the property. The plaintiffs alleged that the first defendant had unlawfully transferred their collective 2/5 shares of the property to her name. It was also alleged that subsequent to the transfer, the first defendant had wrongfully charged the plaintiffs' shares on the property together with their 1/5 share each on the property to secure a personal loan of RM220,000 from the bank ('the third defendant'). The plaintiffs pleaded that they had never signed the memorandum of transfer ('MOT') transferring their shares to the first defendant and the signatures appearing on the MOT for the said transfer were not theirs. The first defendant's pleaded case was that the five registered proprietors were holding the property as trustees for the benefit of their then surviving mother via a trust created by their late father prior to his demise ('trust/secret trust'). The first defendant further asserted that out of the RM220,000 loan monies that she received from the third defendant, the sum of RM170,000 was given to their then surviving mother. The first defendant had counterclaimed against the plaintiffs for general damages for malicious prosecution and abuse of legal process. The third defendant pleaded that the bank was a bona fide chargee, holding indefeasible title on the property for valuable consideration. At the conclusion of the trial, the learned judge had found in favour of the plaintiffs where it was held that the plaintiffs had

successfully proven their case on the balance of probabilities against the first and third defendants and the first defendant's counterclaim was dismissed. Dissatisfied, the third and first defendants filed the two separate appeals. The issues for determination were: (1) whether the learned judge was correct in finding that the plaintiffs had discharged their burden of proof (on the balance of probabilities) that they had never signed the MOT and that the plaintiffs' shares on the property had been unlawfully transferred to the first defendant without the plaintiffs' knowledge by way of forged signatures; and (2) whether the learned judge was correct in finding that the third defendant was not a bona fide subsequent chargee for valuable consideration.

Held, allowing the appeals:

(1) It was utterly suspicious that the plaintiffs had not taken any action to insist upon the police to produce the chemist report that had been prepared to ascertain whether signatures of the plaintiffs on the MOT were genuine or not. This was not a case where there was not any expert evidence available to be tendered into court. This was a case where there was an expert chemist report but was withheld from the court. There was neither any evidence led by the plaintiffs that any attempt was made to secure the release or 'declassification' of the chemist report. Adverse inference under s 114(g) of the Evidence Act 1950 must be drawn for the plaintiffs' failure and refusal to tender the chemist report especially when it was readily testified by their own witness that the chemist report was already in existence. In addition, there was no measure at all of any examination as to the discrepancy or at least degree of discrepancy in the alleged forgeries perpetrated by the first defendant (see paras 34–35, 40–41 & 45).

(2) The learned judge had affirmed the existence of fraud/forgery merely because the documents leading to the equal division of the property to the five sisters were Part A documents. The first defendant's admission to the facts and documents did not by any means prove and/or disprove the existence of fraud or forgery. Nor did it disprove the existence of the trust held for the benefit of their then surviving mother. The absence of a written trust or will was not a be all and end all indication that the secret trust had never existed. It was thoroughly and utterly wrong for the learned judge to find that non-existence of a formal will was fatal to the first defendants' case. Furthermore, the fact that the then surviving mother relinquishing registered interest over the property did not at all disprove the existence of the trust. Thus, the learned judge's simplistic evaluation of the documents was unfortunately erroneous (see paras 47–48, 52 & 55–56).

(3) The circumstantial evidence was beyond compelling for the court to conclude that the plaintiffs' signature was indeed authentic and that the

property indeed was held on trust for their then surviving mother. It would be a grave injustice to allow the plaintiffs to blow hot and cold and negate their prior admission as to the legitimacy of the MOT and the trust created for the benefit of their then surviving mother. The plaintiffs ought to be estopped from now denying the validity of the MOT, the charge, and the trust in favour of their then surviving mother. The failure of the learned judge to test the independent witnesses' evidence against contemporaneous documents and surrounding evidence was in itself a failure of judicial appreciation into the evidence. Thus, the learned judge had wrongfully preferred circumstantial evidence over direct evidence which was readily available in court. Therefore, issue (1) was answered in the negative. The learned judge was wrong in finding that (a) the plaintiffs had discharged their burden of proof on the balance of probabilities that they had never signed the MOT; (b) the plaintiffs' shares on the property had been unlawfully transferred to the first defendant without the plaintiffs' knowledge by way of forged signatures; and (c) the property was not held on trust for the benefit of the then surviving mother (see paras 60, 64, 74, 76 & 79–80).

(4) Since there was no forgery or fraud to impugn the MOT and transfer of the plaintiffs' shares to the first defendant, then there shall not be any impediment to the valid creation of the charge with the third defendant. There was evidence that the loan was granted with full disclosure of the impending transfers of all the shares to the first defendant. Thus, it was not at all conspicuous that the approval of the loan was ahead of the registration of the MOT. There was an absence of any adverse interest on the face of the land title and the MOT prior or during the registration of the transfer under the MOT. Therefore, the third defendant as subsequent chargee shall enjoy deferred indefeasibility and as there was no reason to believe that the third defendant had acted in bad faith, there was no reason to deprive the third defendant off of its deferred indefeasibility of title as subsequent chargee. Thus, issue (2) was answered in the negative. The learned judge was wrong to find that the third defendant bank was not a bona fide subsequent chargee enjoying deferred indefeasibility over the property (see paras 81, 84, 87 & 90–91).

[Bahasa Malaysia summary

Kedua-dua rayuan ini melibatkan tuntutan oleh dua benefisiari bersama ('plaintif') terhadap benefisiari bersama yang lain ('defendan pertama') ke atas harta yang ditinggalkan oleh mediang bapa mereka ('hartanah'). Plaintif dan defendan pertama adalah adik beradik. Mereka mempunyai dua lagi adik perempuan iaitu Lily dan Suzie. Selepas bapa mereka meninggal dunia, plaintif, defendan pertama, Lily dan Suzie telah didaftarkan sebagai pemilik bersama-sama sebanyak 1/5 bahagian setiap hartanah tersebut. Plaintif mendakwa bahawa defendan pertama telah secara tidak sah memindahkan

2/5 saham kolektif hartanah tersebut kepada namanya. Adalah juga didakwa bahawa selepas pemindahan itu, defendan pertama telah secara salah menggadai bahagian plaintif ke atas hartanah bersama-sama dengan 1/5 bahagian masing-masing ke atas hartanah untuk mendapatkan pinjaman peribadi sebanyak RM220,000 daripada bank ('defendan ketiga'). Plaintif memplid bahawa mereka tidak pernah menandatangani memorandum pemindahan ('MOT') yang memindahkan bahagian mereka kepada defendan pertama dan tandatangan yang terdapat pada MOT untuk pemindahan tersebut bukan milik mereka. Kes yang diplidkan oleh defendan pertama ialah lima pemilik berdaftar itu memegang harta itu sebagai pemegang amanah untuk faedah ibu mereka yang masih hidup melalui amanah yang dibuat oleh mendiang bapa mereka sebelum kematiannya ('amanah/amanah rahsia'). Defendan pertama seterusnya menegaskan bahawa daripada RM220,000 wang pinjaman yang diterima daripada defendan ketiga, sejumlah RM170,000 telah diberikan kepada ibu mereka yang masih hidup ketika itu. Defendan pertama telah membuat tuntutan balas terhadap plaintif untuk ganti rugi am untuk pendakwaan berniat jahat dan penyalahgunaan proses undang-undang. Defendan ketiga memplid bahawa bank itu adalah pemegang gadaian bona fide, memegang hakmilik tidak boleh disangkal ke atas hartanah itu untuk pertimbangan sewajarnya. Pada akhir perbicaraan, hakim yang bijaksana telah berpihak kepada plaintif di mana adalah diputuskan bahawa plaintif telah berjaya membuktikan kes mereka atas imbangan kebarangkalian terhadap defendan pertama dan ketiga dan tuntutan balas defendan pertama telah ditolak. Tidak berpuas hati, defendan ketiga dan pertama memfailkan dua rayuan berasingan. Isu-isu untuk penentuan adalah: (1) sama ada hakim yang bijaksana adalah betul dalam mendapati bahawa plaintif telah melepaskan beban pembuktian mereka (berdasarkan imbangan kebarangkalian) bahawa mereka tidak pernah menandatangani MOT dan bahawa bahagian plaintif ke atas hartanah itu telah secara tidak sah dipindahkan kepada defendan pertama tanpa pengetahuan plaintif melalui tandatangan palsu; dan (2) sama ada hakim yang bijaksana betul dalam mendapati bahawa defendan ketiga bukanlah pemegang gadaian bona fide untuk pertimbangan wajar.

Diputuskan, membenarkan rayuan-rayuan:

(1) Adalah benar-benar mencurigakan bahawa plaintif tidak mengambil apa-apa tindakan untuk mendesak polis mengemukakan laporan ahli kimia yang telah disediakan untuk memastikan sama ada tandatangan plaintif pada MOT adalah tulen atau tidak. Ini bukan kes di mana tiada keterangan pakar tersedia untuk dikemukakan ke mahkamah. Ini adalah kes di mana terdapat laporan pakar kimia tetapi ditahan daripada mahkamah. Tiada sebarang keterangan yang dikemukakan oleh plaintif bahawa sebarang percubaan telah dibuat untuk mendapatkan pelepasan atau 'pengubahan status' laporan ahli kimia. Inferens bertentangan di

bawah s 114(g) Akta Keterangan 1950 mesti dibuat untuk kegagalan dan keengganan plaintif untuk mengemukakan laporan ahli kimia terutamanya apabila ia diberi keterangan oleh saksi mereka sendiri bahawa laporan ahli kimia itu telah pun wujud. Di samping itu, tiada langkah sama sekali bagi sebarang pemeriksaan mengenai percanggahan atau sekurang-kurangnya tahap percanggahan dalam pemalsuan yang dikatakan dilakukan oleh defendan pertama (lihat perenggan 34–35, 40–41 & 45).

(2) Hakim yang bijaksana telah mengesahkan wujudnya penipuan/pemalsuan semata-mata kerana dokumen yang membawa kepada pembahagian hartanah yang sama rata kepada lima adik perempuan itu adalah dokumen Bahagian A. Pengakuan defendan pertama kepada fakta dan dokumen tidak dengan apa cara sekalipun membuktikan dan/atau menafikan kewujudan penipuan atau pemalsuan. Ia juga tidak menafikan kewujudan amanah yang dipegang untuk kepentingan ibu mereka yang masih hidup ketika itu. Ketiadaan amanah atau wasiat bertulis bukanlah sebab utama semua petunjuk bahawa amanah rahsia itu tidak pernah wujud. Adalah salah bagi hakim yang bijaksana untuk mendapati bahawa ketiadaan wasiat formal adalah fatal kepada kes defendan pertama. Tambahan pula, fakta bahawa ibu yang masih hidup ketika itu melepaskan kepentingan berdaftar ke atas hartanah itu sama sekali tidak menafikan kewujudan amanah itu. Oleh itu, penilaian mudah hakim yang bijaksana terhadap dokumen malangnya adalah salah (lihat perenggan 47–48, 52 & 55–56).

(3) Keterangan mengikut keadaan mendorong mahkamah untuk membuat kesimpulan bahawa tandatangan plaintif sememangnya sahih dan bahawa hartanah itu sememangnya dipegang atas amanah untuk ibu mereka yang masih hidup ketika itu. Ia akan menjadi satu ketidakadilan yang serius untuk membenarkan plaintif bertukar fikiran dan menafikan pengakuan mereka sebelum ini tentang kesahihan MOT dan amanah yang dibuat untuk manfaat ibu mereka yang masih hidup. Plaintif-plaintif harus diestop daripada sekarang menafikan kesahihan MOT, gadaian, dan amanah kepada ibu mereka yang masih hidup ketika itu. Kegagalan hakim yang bijaksana untuk menyemak keterangan saksi bebas terhadap dokumen semasa dan keterangan sekeliling dengan sendirinya adalah kegagalan penilaian kehakiman terhadap keterangan. Oleh itu, hakim yang bijaksana telah secara salah memilih keterangan mengikut keadaan berbanding keterangan langsung yang sedia ada di mahkamah. Oleh itu, isu (1) dijawab secara negatif. Hakim yang bijaksana telah salah apabila mendapati bahawa (a) plaintif telah melepaskan beban pembuktian mereka atas imbangan kebarangkalian bahawa mereka tidak pernah menandatangani MOT; (b) bahagian plaintif ke atas hartanah itu telah dipindahkan secara menyalahi undang-undang kepada defendan pertama tanpa pengetahuan plaintif

melalui tandatangan palsu; dan (c) hartanah itu tidak dipegang secara amanah untuk faedah ibu yang masih hidup ketika itu (lihat perenggan 60, 64, 74, 76 & 79–80).

(4) Memandangkan tiada pemalsuan atau penipuan untuk mempersoalkan MOT dan pemindahan bahagian plaintif kepada defendan pertama, maka tidak akan ada apa-apa halangan kepada penciptaan sah gadaian dengan defendan ketiga. Terdapat keterangan bahawa pinjaman itu telah diberikan dengan pendedahan penuh mengenai pemindahan semua bahagian yang akan berlaku kepada defendan pertama. Oleh itu, adalah tidak terserlah bahawa kelulusan pinjaman adalah lebih awal daripada pendaftaran MOT. Terdapat ketiadaan sebarang kepentingan bertentangan atas hakmilik tanah dan MOT sebelum atau semasa pendaftaran pindah milik di bawah MOT. Oleh itu, defendan ketiga sebagai pemegang gadaian berikutnya akan menikmati ketidakbolehsangkalan tertunda dan kerana tidak ada sebab untuk mempercayai bahawa defendan ketiga telah bertindak dengan niat jahat, tidak ada sebab untuk melucutkan hakmilik defendan ketiga yang tertunda sebagai pemegang gadaian berikutnya. Oleh itu, isu (2) telah dijawab secara negatif. Hakim yang bijaksana telah salah apabila mendapati bahawa defendan ketiga bukanlah pemegang gadaian bona fide yang menikmati ketidakbolehsangkalan tertunda ke atas hartanah tersebut (lihat perenggan 81, 84, 87 & 90–91).]

Cases referred to

Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor [2007] 1 MLJ 101, CA (refd)

Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor [2020] 4 MLJ 581, FC (refd)

Choong Shin Cheong v Suruhanjaya Syarikat Malaysia & Anor [2020] 5 MLJ 523, CA (refd)

Dato' PB Ashok a/l PB Krishnan Pillai & Ors v Azrin Fazrina bt Jamri & Anor [2022] MLJU 495, HC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (distd)

Malayan Banking Bhd v Mohd Affandi bin Ahmad & Anor and another appeal [2023] MLJU 2160, CA (refd)

Marzida bt Mansor v Lembaga Kumpulan Wang Simpanan Pekerja [2023] 4 MLJ 364, CA (refd)

A *PP v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, FC (refd)
PP v Mohd Nazrul bin Shuhaimi [2009] 6 MLJ 662, HC (refd)
See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank (M) Bhd and another appeal [2021] 5 MLJ 759, FC (refd)

B **Legislation referred to**

Evidence Act 1950 s 114(g)
Land Ordinance (Cap 68)
National Land Code s 340
C Rules of Court 2012 O 15 r 6(2)(b)(ii), O 34 r 2(2)(d)

Appeal from: Originating Summons No BKI-22NCVC-97/8 of 2017 (High Court, Kota Kinabalu)

Irene Vitus @ Caroline (MG'S Legal Chambers) in Appeal S-01(NCVC)(W)-379–08 of 2020 for the appellant.
D *Chau Shin Yee (Sugumar & Co) in Appeal S-01(NCVC)(W)-390–08 of 2020 for the appellant.*
Wan Kher Ching (Michael Denis Tan & Co) in Appeal S-01(NCVC)(W)-379–08 of 2020 for the first and second respondents.
E *(Sabah State Attorney General's Department) in Appeal S-01(NCVC)(W)-379–08 of 2020 for the third respondent.*
Wan Kher Ching (Michael Denis Tan & Co) in Appeal S-01(NCVC)(W)-390–08 of 2020 for the respondents.

F **Azimah Omar JCA (delivering judgment of the court):**

INTRODUCTION

G **[1]** The two appeals before us concern a claim by two co-beneficiaries ('the plaintiffs') against another co-beneficiary ('the first defendant of a property left by their deceased's father ('the deceased estate'). The plaintiffs alleged that the first defendant had unlawfully transferred their collective 2/5th shares (each of the plaintiffs owns 1/5th share) of the deceased's estate's property to her name.
H It was also alleged that subsequent to the transfer, the first defendant had wrongfully charged the plaintiffs' shares on the property together with their 1/5th share each on the property to secure a personal loan of RM220,000 from the bank ('the third defendant bank').

I **[2]** The second defendant in this action is the Registrar of Titles, Lands and Surveys Department. They were sued as a nominal defendant for purposes of execution of any consequential orders made by the court if at the end of the case the plaintiffs were to succeed in their claim. At the High Court, the learned State Counsel who appeared for the second defendant had placed on record

that they would not be taking part in the trial of the action and would abide by the decision handed down by the court.

THE BACKGROUND FACTS

[3] For a better understanding of the matter at hand, it is necessary to set out the facts of the case that has led to the present appeals before us. The plaintiffs (Fung Shaw Yiew @ Jellfer — first plaintiff) and Fung Shaw Fa @ Emily — the second plaintiff) and the first defendant (Fung Lee Mee @ Jellsie) are siblings. They have two other sisters namely; Fung Lee Lee @ Lily Fung ('Lily') and Fung Siew Yee @ Suzie Fung ('Suzie').

[4] As we have mentioned earlier, the dispute in this matter relates to a property left by the late Fung Sing Wah @ Ah Sing who was the late father of the plaintiffs, the first defendant as well as Suzie and Lily who were not parties this suit. Fung Sing Wah @ Ah Sing had passed away on 8 November 1991. The property is a double-storey corner commercial shophouse located at Lot 26, Cameron Villa, 3.5 mile, Jalan Penampang situated in the District of Kota Kinabalu and held under Country Lease No 015328471 ('the property').

[5] By an order of succession ('Jadual Tiga') issued by the Mahkamah Anak Negeri Kota Kinabalu under Native Court Case No 192/92 and registered by the Registrar of Titles under Memorial No 10285510, the two plaintiffs Jellfer and Emily, the first defendant (Jellsie), Lily and Suzie were registered as equal co-owners of 1/5th share each of the property.

[6] The third defendant bank (Public Bank Bhd) is the chargee over the whole of the property in dispute. The third defendant bank was not a party to the dispute between the plaintiffs and the first defendant, until after conclusion of trial when it was revealed that a charge was subsisting over the property in favour of the third defendant bank.

[7] The learned High Court judge was of the view that although the plaintiffs' action was only in respect of their respective 1/5 shares in the property, but since the charge was over the whole of the property, therefore the rights of the third defendant bank were likely to be affected by the outcome of the trial in the event the court should rule in favour of the plaintiffs. The High Court had therefore, on 11 October 2019, invoked O 15 r 6(2)(b)(ii) of the Rules of Court 2012 and ordered that the third defendant bank be made as a party in this action.

[8] It remains clear to us that as far as the plaintiffs are concerned, they firmly stood on the position that although being the co-proprietors of the property having an equal 1/5th share each, they purportedly claimed that they

were unaware that the said property was wholly transferred to the first defendant. The plaintiffs also asserted that they were unaware that subsequent to having the property solely under her name, the first defendant had obtained a personal loan of RM220,000 for her benefit from the third defendant bank. As security of the said loan, a registered charge was effected on the property in favour of the third defendant bank. It was also the pleaded case of the plaintiffs that they had never signed the memorandum of transfer ('MOT') transferring their shares to the first defendant and the signatures appearing on the MOT for the said transfer were not theirs.

[9] On the contrary, although not disputing that property was previously registered under the names of the plaintiffs, the first defendant, Lily and Suzie (as equal co-proprietors by virtue of the Jadual Tiga), the first defendant's pleaded case was that the five registered proprietors were holding the property as trustees for the benefit of their then surviving mother, Wong Nyet Ting via a trust created by their late father prior to his demise (trust/secret trust).

[10] The first defendant further asserted that out of the RM220,000 loan monies that she received from the third defendant bank, the sum of RM170,000 was given to their then surviving mother by crediting the sum into her Public Bank Account No 4979349606 jointly held with Lily on 4 September 2002.

[11] In her retaliation of the plaintiffs' claim against her, the first defendant had counterclaimed against the plaintiffs for general damages for malicious prosecution and abuse of legal process.

[12] The third defendant bank had refuted the plaintiffs' claims against the creation of the charge over the property. The third defendant bank staunchly asserted that notwithstanding the fact they knew (from their land search conducted and endorsements on the title prior to granting the loan facility to the first defendant) about the relationship of the five siblings in relation to the inheritance of the property, they vehemently denied that the transfer of the plaintiffs' shares in the property to the first defendant (and even the charge on the property executed by the first defendant) were carried out without the knowledge of the plaintiffs, Suzie, and Lily.

[13] The third defendant bank also denied that it had colluded with the first defendant to cover up any alleged forgery. The third defendant bank pleaded that the bank is a bona fide chargee, holding indefeasible title on the property for valuable consideration.

[14] Now, it is to be noted that the plaintiffs' action originally began as a siblings' dispute over their deceased father's property. However, following the

addition/the inclusion of the third defendant bank as a party, the action is now inter-twined with the issue whether or not the third defendant bank's title or interest over the property as subsequent chargee was indefeasible as a bona fide chargee for valuable consideration.

The first defendant's defence and counterclaim

[15] The first defendant pleaded that although the property was previously registered in their names as equal co-owners pursuant to the order of succession (Jadual Tiga) issued by the Mahkamah Anak Negeri Kota Kinabalu on 10 March 1993, the first defendant, Lily, Suzie and the plaintiffs were in actual fact holding the property on trust created by their late father before he passed away for the benefit of their mother, Wong Nyet Ting @ Ahut.

[16] The first defendant denied that the MOT was not signed by the plaintiffs and further pleaded that all of the five sisters did so at the direction of their then surviving mother in a family meeting held after they discovered that the plaintiffs had attempted to sell off the property to a third party for the sum of RM160,000 without her knowledge or consent. The first defendant further stated that the plaintiffs had executed the MOT in front of two attesting witnesses working with the Lands and Surveys Department at the material time.

[17] After the transfer, the first defendant charged the property to the third defendant to secure a loan amounting to RM220,000 (amount of which was released to the first defendant on 29 August 2002). A sum of RM170,000 from the loan amount was remitted by the first defendant to their late mother by crediting the monies into her Public Bank Account No 4979349606 jointly held with Lily on 4 September 2002.

[18] The first defendant counterclaimed for general damages for malicious prosecution and abuse of legal process.

The third defendant's defence

[19] The third defendant bank pleaded that by a letter of offer dated 22 July 2002, it had granted a credit facility of RM220,000 to the first defendant for the purpose of 'personal consumption'. The credit facility was secured by a charge over the property in favour of the third defendant bank.

[20] While admitting to having knowledge of the relationship between the five sisters' inheritance of the property (based on the land search conducted and endorsements on the title of the property prior to granting the credit facility to the first defendant) the third defendant bank denied that the transfers from the

plaintiffs to the first defendant (and the creation of the charge) were made without the consent or knowledge of the plaintiffs, Lily and Suzie.

[21] The third defendant bank further denied colluding with the first defendant to cover up any alleged forgery and pleaded that it was a bona fide subsequent chargee of the property for valuable consideration.

[22] We noted from the learned judge's grounds of judgment that in determining the action before her, she was guided by the agreed issues which the parties had set out in encl 95 filed by the plaintiffs' solicitors. The agreed issues were namely:

(a) issues between the plaintiffs and the first defendant:

(i) whether the plaintiffs' 1/5 undivided shares each in the property and duly registered on 28 June 1993 under Memorial No 10285510 pursuant to an O of succession from the Mahkamah Anak Negeri in the matter of the estate of Fung Sing Wah @ Ah Sing under Native Court Case No 192/92 are lawful inheritance for their own benefits or conversely, as contended by the first defendant, given to the plaintiffs along with the first defendant and two other sisters namely Lily and Suzie on trust for the benefit of their mother, Wong Nyet Ting @ Ahut;

(ii) whether the plaintiffs did sign the MOT purporting to transfer their respective 1/5 undivided share in the said property to the first defendant on the direction of their late mother, the said Wong Nyet Ting @ Ahut as contended by the first defendant or the MOT was not executed by the plaintiffs and was effected without their prior knowledge and approval,

(iii) in the event the answer to issue (ii) above is the MOT was not executed by the plaintiffs and was effected without their prior knowledge and approval, whether the registration of the first defendant as the transferee of the plaintiffs' shares in the property and duly registered as Memorial No 1405428 on 22 August 2002 and the subsequent charge by the first defendant to the third defendant bank and duly registered as Memorial No 1405429 on 22 August 2002 are liable to be set aside on the ground that the MOT was an invalid or vold instrument; and

(iv) whether the first defendant is liable to make restitution to the plaintiffs and in damages and if so, what measure of damages.

(b) issues between the plaintiffs and the third defendant bank:

(i) what is the effect of the said charge of the third defendant in the event the court finds the instrument of transfer dated 22 August

2002 purportedly to transfer the first and second plaintiffs' 1/5 undivided shares each in the property to the first defendant to be invalid or a nullity; and

(ii) whether the said charge confers on the third defendant bank an indefeasible title or interest in the property upon registration or conversely, liable to be set aside at the instance of the first and second plaintiffs as the rightful owners of the 1/5 undivided shares each in the property.

BEFORE THE HIGH COURT

[23] At the conclusion of the trial, the learned judge had found in favour of the plaintiffs where the learned judge held that the plaintiffs had successfully proven their case on the balance of probabilities against the first defendant and the third defendant bank. The learned judge thereby allowed the reliefs claimed by the plaintiffs in their amended statement of claim namely; amended prayers 1(i), (ii) and (iii), 2 (ii), (iii) and ordered the first defendant and the third defendant bank to pay costs to the plaintiffs.

[24] The learned judge had dismissed the first defendant's counterclaim against the plaintiffs.

[25] From her grounds of judgment, we identified that the learned judge had primarily allowed the plaintiffs' claim on the following grounds:

(a) although the plaintiffs did not call any handwriting expert during trial to support their pleaded case for alleged forgery, guided by the decision in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 ('Letchumanan'), the learned judge concluded that on the totality of evidence, the plaintiffs had proven the following on the balance of probabilities:

(i) the plaintiffs' shares in the property were lawfully inherited from their father's estate and that the property was not held on trust; and

(ii) the plaintiffs did not sign the MOT dated 20 February 2002 to transfer their respective shares in the property to first defendant.

(b) the learned judge had arrived at the above conclusion based on the following reasons:

(i) para 2 of the statement of agreed facts mutually admitted to the equal distribution to the five siblings while the letter issued by the Kota Kinabalu Native Court dated 10 March 1993 to the Lands & Surveys Department (enclosing Jadual 3) also ordered that the

property be distributed in equal shares to the five siblings. Since these documents were put in Part A, thus the documents' contents and authenticity were mutually agreed to by the parties. The Jadual Tiga was endorsed with the Memorial No 110285510 ie the same Memorial Number which appeared on the title deed of the property. By virtue of O 34 r 2(2)(d) of the Rules of Court 2012 the parties are therefore bound by the facts they have agreed to;

(ii) the learned judge had found that the plaintiffs were truthful witnesses. She had accepted the first plaintiff's narrative about her discovery that the plaintiff's shares were unlawfully transferred to the first defendant to be the truth;

(iii) PW1 had testified that circa 2014 *(22 years since initially obtaining of 1/5 share and 12 years since transferring the same share to the first defendant)* she was having financial difficulties when her husband passed away and had sought for the siblings' mutual brother's ('PW4') assistance. This prompted PW4 to remind her of the property which he said was generating rental income. Thereafter, they had gone to the Lands and Surveys Department on 3 September 2014 to conduct a land search over the property. From there, it was allegedly found out that the property had been wholly transferred to the first defendant in the year 2002. The plaintiffs subsequently obtained a copy of the MOT and memorandum of charge executed by the first defendant in favour of the third defendant bank. Upon such alleged discovery, two days later on 5 September 2014, PW1 lodged a police report. About three weeks after lodging the police report, on 1 October 2014 the plaintiffs had instructed their solicitors to apply for Collector's caveat and also to lodge a private caveat. Following PW1's police report, the police had begun their investigation on the allegation by the plaintiffs and as at the date of trial the police investigation was still ongoing (as was confirmed by PW2 who is the Head of Commercial Unit at the Keningau District Police Headquarters);

(iv) PW2 testified that following the police investigation, a chemist report had been prepared to ascertain whether signatures of the plaintiffs on the MOT were genuine or not. However, the chemist report was not produced in court as it was 'classified' and that it was part of the investigation papers of the ongoing investigation;

(v) the learned judge believed and accepted the evidence of PW1, PW2 and the documents (the police report and the lodgement of caveats) tendered by the plaintiffs. The plaintiffs had tendered the official receipt for the land search issued by the Lands and Surveys Department on 3 September 2014 which date corresponded with

the certification stamp on the copy of the title deed and MOT obtained by the first plaintiff;

(vi) the learned judge held that the Official Receipt of Land Search done by the plaintiffs had supported the plaintiffs' evidence that the first plaintiff had conducted a land search in respect of the property in 2014 and upon the land search being done they allegedly discovered for the first time, of the transfer of their shares to the first defendant;

(vii) the learned judge found that the plaintiffs' evidence and the contemporaneous documents had supported the plaintiffs' pleaded case that they never went to the Lands and Surveys Department at Tambunan and Kota Kinabalu on 22 April 2002 to sign the MOT before the attesting witnesses, DW2 and DW4 (land office clerks in Tambunan and Kota Kinabalu respectively). Therefore, the plaintiffs allegedly have never signed the MOT;

(viii) the learned judge further accepted the evidence of PW4. She made a finding that PW4's evidence had supported the plaintiffs' version of the circumstances which has led to the transfer of the property to his five sisters and the manner in which the unlawful transfer of the plaintiffs' shares to the first defendant was uncovered by the first plaintiff. PW4 had also corroborated the plaintiffs' position that the property was not held by the plaintiffs on trust for their mother. The relevant portion of PW4's evidence is reproduced below:

> A5: When my father passed away, he had this shophouse at Kota Kinabalu in his own name. After discussion with my mother, Wong Nyet Ting, my mother and I decided that we and my two younger brothers, Fung Tee Ing and Fung Tee Lo will not claim any share in the Shophouse and to allow the five (5) daughters to have the Shophouse in equal shares. I have no problem to give up my share of the Shophouse although I have the right to claim as I already made a promise to my late father before he passed away. My mother also did not want any share of the Shophouse. As the lawful wife, my mother made the application to Mahkamah Anak Negeri and she also on behalf of her three (3) sons made a *surat akuan* on 09.02.1993.

(ix) the learned judge held that there was no good reason to disbelieve PW4's direct evidence as to how the *surat akuan* came about;

(x) the learned judge had accepted exh 'P3' — *surat akuan* dated 9 February 1993 made by the parties' late mother. She found that P3 was not only a contemporaneous evidence but was wholly consistent with the subsequent grant of Jadual Tiga by the Mahkamah Anak Negeri a month later on 10 March 1993. Without their mother's *surat akuan*, there would not have been any

A basis for the Native Court to allow the daughters to inherit the property to the exclusion of their mother and brothers; and

(xi) the learned judge had wholly rejected the evidence of the first defendant ('DW1') and her witnesses.

B

[26] Dissatisfied with the learned judge's decision, the third defendant bank and the first defendant had filed the two separate appeals before us.

[27] Appeal No S-01 (NCVC)(W)-379–08 of 2020 ('Appeal 379') was C primarily the third defendant bank's appeal to defend its position as a bona fide subsequent chargee for value holding deferred indefeasible title. On the other hand, Appeal No S-01 (NCVC)(W)-390–08/2020 ('Appeal 390') was the first defendant's appeal essentially to challenge the learned judge's finding of the unlawful and invalid transfer of the plaintiffs' shares of the property to the first D defendant and that the shares were not held on trust for their then surviving mother.

THE APPEAL BEFORE US

E

[28] We have perused both appeals' memorandums of appeal, records of appeal, and all respective written submissions in both *Appeals 379 and 390* and verily believe that both of the appeals can be determined by answering the following issues:

F (a) *issue 1*: whether or not the learned judge was correct in finding that the plaintiffs have discharged their burden of proof (on the balance of probabilities) that they had never signed the MOT and that the plaintiffs' shares (1/5th share each) on the property had been unlawfully transferred to the first defendant without the plaintiffs' knowledge by G way of forged signatures; and

(b) *issue 2*: whether or not the learned judge was correct in finding that the third defendant bank was not a bona fide subsequent chargee for valuable consideration.

H

[29] The parties shall herein be referred to in their original capacities as they were in the High Court.

Issue 1: Whether or not the learned judge was correct in finding that the plaintiffs I *have discharged their burden of proof (on the balance of probabilities) that they had never signed the mot and that the plaintiffs' shares (1/5 share each) on the property had been unlawfully transferred to the first defendant without the plaintiffs' knowledge by way of forged signatures*

[30] Now, it defies logic and the law if we were to outright agree that the tendering of a handwriting expert was not at all necessary for the plaintiffs to prove their allegation of fraud by means of forgery of their signatures. The law and plain logic would dictate that evidence from a handwriting expert would be most scientifically helpful to guide the wisdom of the court as to the authenticity of the plaintiffs' signatures appearing on the MOT. Although we are also aware that evidence of a handwriting expert is not the only manner of evidence that could prove or disprove an allegation of forgery. But the usefulness of such expert evidence cannot be denied.

[31] Peculiarly, the plaintiffs' own witness, PW2 testified that in the course of investigating the plaintiffs' police report, the police indeed has obtained a chemist report over the impugned signatures. The plaintiffs could have at least applied for the release of the chemist report (which was readily available) but instead the plaintiffs simply abided by PW2's reluctance to tender the chemist report on the ground that it was 'classified' and production of the same would somehow 'impede' on an ongoing investigation.

[32] We are pressed to remark that the plaintiff's police report was lodged some *NINE (9) YEARS AGO* on 5 September 2014. It is profoundly odd and suspicious that closing into a decade into the police's investigation, the police still was 'not ready' to divulge its findings vide the chemist report in which the police had already obtained.

[33] In fact, if a chemist report has already been obtained almost a decade ago and the police still remained silent without any action mounted against the first defendant, then it is far more probable than not that the police themselves disbelieve of the plaintiffs' allegations.

[34] We find it utterly suspicious that the plaintiffs had not taken any action to insist upon the police to produce the chemist report. If the plaintiffs were so confident and genuine in their allegation of fraud and forgery, then the plaintiffs should have fought tooth and nail to have the chemist report to 'unravel' the first defendant's alleged misdeeds.

[35] Thus, this was not a case where there was not any expert evidence available to be tendered into court. This was a case where there was an expert chemist report but was withheld from the court. We cannot reconcile with the plaintiffs' peculiar 'surrender' to just leave the chemist report to remain 'classified' after almost ten years of 'investigation'.

[36] We understand that the learned judge fiercely relied upon the Federal Court's decision in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v*

Secure Plantation Sdn Bhd [2017] 4 MLJ 697 in supporting her decision to do away with expert evidence and simply consider the *factum probans* (the circumstantial evidence) surrounding the case. Indeed, we do not intend to contradict the Federal Court's ruling that a handwriting expert is not the be all and end all evidence to prove forgery. However, the real depth of the Federal Court's decision is not as simplistic. We have to properly examine the Federal Court's ratio decidendi. The first relevant excerpt of the decision reads:

> It is not necessary to examine a handwriting expert in every case of disputed writing. *No adverse inference can be drawn against a party from the fact that the opinion of the handwriting expert HAS NOT BEEN OBTAINED* ... the principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, ie the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue, but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principal act can be legally inferred or presumed' (Woodroffe and Amir Ali Vol 2 at p 2236). 'The modes of proof envisaged in ss 45 and 47 of the Act are not exclusive for proving the genuineness or authorship of a document' (Woodroffe and Amir Ali Vol 2 at p 2237). Comparison may be made, by a handwriting expert under s 45 of the Evidence Act, by anyone familiar with the handwriting of the person concerned as provided by s 47 of the Evidence Act, or by the court itself.
>
> *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697. (Emphasis added.)

[37] The first limb of the Federal Court's decision has already prescribed the first qualification upon the rule. And that qualification is no adverse inference can be drawn *only if opinion of a handwriting expert HAS NOT BEEN OBTAINED.* Thus, it still stands to good law and reason that adverse inference can still be drawn if expert evidence *HAD INDEED BEEN OBTAINED BUT WAS WITHHELD* from court. And this was exactly the case in the appeal before us. It was not that the expert evidence had not been obtained but instead was withheld. The plaintiffs knew that there was already a chemist report, but remained nonchalant as to the production of the same into the court below.

[38] It is an entirely distinct circumstance between:

(a) consciously opting to not opt for handwriting expert in full belief of other circumstantial evidence surrounding the case; and

(b) surreptitiously withholding a chemist report upon the signatures when the chemist report already existed and should have been made available for the court's benefit and scrutiny.

[39] If a chemist report on the signatures has already existed, then the best evidence rule would dictate that the chemist report should be the best evidence

that the plaintiffs should have tendered into court for examination at trial. The chemist report would then be the 'best evidence'.

[40] There was neither any evidence led by the plaintiffs that any attempt was made to secure the release or 'declassification' of the chemist report. The plaintiffs knew that the chemist report existed, and simply let it remain idle within the police's archives for almost a decade. There was not even a letter produced to show the plaintiffs' genuine attempt of securing the chemist report. It was resoundingly obvious that the plaintiffs were disinterested in shedding light onto the truth by scientific means.

[41] It is only when there was no expert evidence at all that the best evidence available to the court would be the other evidence surrounding the case. Thus, it would be remiss if we were to let this glaring withholding of evidence by the plaintiffs to remain unscathed. We must justly and appropriately draw the necessary adverse inference under s 114(g) of the Evidence Act 1950 for the plaintiffs' failure and refusal to tender the chemist report especially when it was readily testified by their own witness that the chemist report was already in existence. We cannot stand by and accept the lacklustre excuse that the chemist report was still 'classified' after almost ten years of 'investigation' into the authenticity of their signatures. It is only just and appropriate that the Federal Court decision in *Letchumanan* be distinguished from the case before us.

[42] There is a stark distinction between not obtaining a chemist report and withholding the chemist report. In cases where a chemist report was admitted to be obtained (and yet was withheld), an adverse inference ought to be drawn for such inexplicable withholding of evidence. We accordingly refer to the case of *Public Prosecutor v Mohd Nazrul bin Shuhaimi* [2009] 6 MLJ 662 which had addressed a similar situation where a chemist report was admitted to be available, but the chemist was inexplicably withheld from the court:

> FAILURE TO CALL THE CHEMIST
>
> [21] More telling in this case is that the doctor conducting the post mortem had handed a number of samples to be analysed and the IO himself had seized *certain items from the accused which were in fact sent to the Chemist Department yet the chemist who analysed the exhs was not called to testify and neither was there proof that the chemist report was served on the accused.*
>
> [22] *I did not hesitate in this case in invoking an adverse inference against the prosecution under* s 114(g) of the Evidence Act . In doing so I took heed of what was stated in the Federal Court case of *Ghazalee bin Kassim & Ors v Public Prosecutor and other appeals* [2008] 3 MLJ 473; [2009] 1 LNS 447 where it was stated as follows:
>
> > The court will only invoke s 114(g) of the Evidence Act for failure to call a witness if it is of the opinion that the prosecution does so to withhold or suppress evidence which, if produced could be construed against the prosecution or otherwise in favor of the accused. The prosecution can also in the alternative,

A offer to the defence any witness which they do not wish to call. As to which witness the prosecution chooses to call is entirely up to them. Calling a wrong witness may be detrimental to their case. The same goes if they fail to call a material witness. This is where s 114(g) of the Evidence Act may be invoked by the court.

B [23] *In this case the prosecution failed to explain the non-calling of the chemist and surely the chemist being a government servant should be easily available to testify.* The prosecution might not necessarily be suppressing or withholding evidence unfavorable to them but in the circumstances of this case where the prosecution was relying on circumstantial evidence the chemist had to be regarded as a material C witness. (Emphasis added.)

[43] For the sake of completeness, we shall continue to scrutinise the learned judge's misplaced reliance upon the Federal Court's decision in *Letchumanan*. Now, the Federal Court in *Letchumanan* held that in absence (not in D withholding) of expert evidence, the courts can look into other *factum probans* or surrounding circumstantial evidence to identify the truth in an allegation of fraud or forgery. However, it is not at all true that this allowance was without any limitations or qualification. The following limb of the judgment prescribes E another qualification and caution as to this allowance:

As a matter of extreme caution and judicial sobriety, the court should not normally, take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of the slightest doubt, leave the matter to the wisdom of the experts. But this does not mean that the court does not F have any power to compare the disputed signature with the admitted signature. That power is clearly available under s 73 of the Act' (Woodroffe and Amir Ali Vol 2 at p 2236). *But 'if the feature of writing and signature on the documents are SO GLARING*, that the court can form an opinion by itself either way, further exercise under s 45 may virtually become unnecessary or futile' (Woodroffe and Amir Ali G Vol 2 at p 2248). That was practically said in *Siaw Kim Seong v Siew Swee Yin (f) & Anor* [2009] 1 MLJ 349, where the supposed signatures of *the plaintiff did not match his admitted signatures upon a CURSORY VISUAL EXAMINATION*, and where it was said by the Court of Appeal per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, that the trial judge ought to have acted under H s 73(1) of the Evidence Act 1950 and made the comparison himself and that 'had the judge undertaken such an examination he would have concluded, even without the aid of an expert, that the signatures appearing on the assignment and the transfer *WERE PLAIN AND UNDISGUISED FORGERIES'*. It should be clear enough that a finding of forgery could be made without the opinion evidence of a handwriting expert. (Emphasis added.)

I

[44] From the excerpt above, it is clear that the qualifications are as follows:

(a) the court should as far as practicable, leave the matter to the wisdom of the expert;

(b) even if there is the slightest of doubt, the court should leave the matter to the expert; and

(c) the court may do away with expert evidence only if the forgery was 'SO GLARING' and by simple and 'CURSORY VISUAL EXAMINATION' the signature appears to be 'PLAIN AND UNDISGUISED FORGERIES'.

[45] We have examined the learned judge's judgment and we found no measure at all of any examination as to the discrepancy or at least degree of discrepancy in the alleged forgeries perpetrated by the first defendant. Thus, it is unfortunately clear that the learned judge has failed to address her mind of these qualifications before her examination into the circumstantial evidence surrounding the case. This alone was an appealable error and failure of judicial appreciation of evidence.

[46] Nonetheless we continue on to scrutinise the learned judge's appreciation of the circumstantial evidence she so believed had discharged the plaintiffs' burden of proof. Upon reading the grounds of judgment, we identified the supposed circumstantial evidence that the learned judge had relied upon:

(a) *the learned judge had disregarded and attached no value onto the direct evidence* proffered by the first defendant vide the independent testimonies of the governmental workers (legal clerks of the Land Office) and preferred the other supposed circumstantial evidence;

(b) the circumstantial evidence of the *surat akuan*, the statement of agreed facts, and the Jadual 3 ('documents') being Part A documents, means that the first defendant already admitted the truth of the equal division of the property to the five sisters to be not under any trust;

(c) the testimony of their common brother ('PW4') corroborated the contents of the *surat akuan* and Jadual 3;

(d) the circumstantial evidence that the then surviving mother would not have relinquished her claim over the property if she truly was claiming beneficial ownership under the trust; and

(e) the circumstantial evidence that the deceased did not leave a written will to evince his intention to create the supposed trust.

[47] It was very clear that the learned judge had affirmed the existence of fraud/forgery merely because the documents leading to the equal division of the property to the five sisters were Part A documents. It must be reminded that the factum of the equal division of the property was never a disputed fact. It was

indeed an admitted fact even by the first defendant that the property was equally divided to the five sisters' ownership of 1/5th share each.

[48] Thus, it was no dent or discredit against the first defendant's case to admit the facts and documents leading to the equal division of rights over the property to the five sisters. Such an admission does not by any means prove and/or disprove the existence of fraud or forgery. Nor does it disprove the existence of the trust held for the benefit of their then surviving mother.

[49] As against the statement of agreed facts, the *surat akuan* and Jadual 3, we must be minded that the entire saga behind the property, is a family. Nothing in the disputations and relationship between the parties were strictly commercial and formal to any minute degree. Thus, the learned judge should not have rigidly interpreted the parties' relationship as per these documents too strictly to the words within the four corners of the documents. This was a family and typical of families, many of its workings were by unwritten conventions and mutual unwritten understanding.

[50] Indeed, the *surat akuan* evinced the then surviving mother's intent to not claim registered proprietorship over the property. But there were no express words to negate any intention of the trust. Proving relinquishment of registered interest does not at all automatically negate the existence of trust. Nor does relinquishing REGISTERED interest would automatically mean relinquishing BENEFICIAL interest over the property.

[51] This was the reason the Federal Court very recently upheld the existence of *secret trusts* within the legal framework of the nation in the case of *Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor* [2020] 4 MLJ 581:

> As a creature of common law, *secret trusts OPERATED OUTSIDE THE FORMALITIES of the Wills Act 1959* as a form of inter vivos express *trust* in which the testator and trustee mutually agreed to form a *trust* relationship for the lifetime of the testator. *secret trusts* were enforced to promote the main policy principle behind the Wills Act 1959, namely, *to protect the testamentary freedom of testators*. (Emphasis added)

[52] Thus, the absence of a written trust or will was not a be all and end all indication that the secret trust had never existed. If that shall be the case, then the entire concept of secret trust would have lost any meaning and significance. Of course, it remains incumbent upon the first defendant to discharge her burden of proof to prove the existence of the secret trust. It was thoroughly and utterly wrong for the learned judge to find that non-existence of a formal will was fatal to the first defendants' case. The Federal Court in the same decision above defined secret trust as follows:

> [27] *Snell's Equity* (33rd Ed, Sweet & Maxwell, 2015), para 24–023 at p 660 offers

the following definition of *secret trusts:*

> A *secret trust* gives effect to the express intentions of a testator *WHICH ARE NOT CONTAINED IN A WRITTEN DOCUMENT DULY EXECUTED AS A WILL*. A will is a public document. The advantage of a *secret trust* is that the testator may use a will to implement his wish to establish a *trust* upon his death without disclosing the intended beneficiary or the terms under which he holds.
>
> *Secret trusts* are a device by which the express intention of a person to make a testamentary gift may be enforced *DESPITE the testator's failure to comply with the formalities for the execution of a will or testamentary disposition under the Wills Act 1837*. They demonstrate the rationale of preventing the fraudulent reliance on the statutory formalities as a justification for denying the enforceability of the *secret* trustee's expressly undertaken obligations ... (Emphasis added.)

[53] Thus, the learned judge's finding of fatality against the first defendant's case even directly contradicted the very Federal Court decision in which the learned judge had relied upon in concluding her decision. A formally executed will was never a required element to prove a secret trust.

[54] In fact, it was never the law that the only legitimate form of trust would be a formally executed express trust. It was recently restated that a trust may exist and may be proven despite there were no express written trust ever being executed. We refer to the recent decision in the case of *Dato' PB Ashok a/l PB Krishnan Pillai & Ors v Azrin Fazrina bt Jamri & Anor* [2022] MLJU 495:

> [11] *The Federal Court explained how trusts are created in Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd and other appeals* [1991] 1 MLJ 293:
>
> Trusts are either (i) express trusts, which are created expressly or impliedly by the actual terms of some instrument or declaration, or which by some enactment are expressly imposed on persons in relation to some property vested in them, whether or not they are already trustees of that property; or *(ii) trusts arising by operation of law (other than express trust imposed by enactments)* (see para 523 of 48 *Halsbury's Laws of England* (4th Ed)). trusts arising by operation of law could be constructive and resulting trusts. Although we would agree with the view that a trust should not normally be imported into a commercial relationship, yet we would hold that in cases such as those involved in these appeals the court could and should consider the facts to determine whether a fiduciary relationship existed. *We therefore agreed with Mr Wong that in the present cases we must consider the circumstances concerning the relationship between the parties*. We were satisfied and agreed with the learned judge that in the circumstances agreements themselves do not contain an express clause that the proceeds of sale would be held on trust, as it is clearly manifested in the agreements and the correspondence concerned that it was the intention of the parties that the Emporium or its outlets as licensors should, after deduction of the fees and commissions agreed to be paid to them, make over to the concessionaires or consignors all payments by third customers. We also agreed with the learned judge and Mr Wong that the principle in *Re Hallet's Estate* should be applied to

these cases and that the cash found in the tills of the various outlets and in the bank accounts as at 10 March 1987, are the subject matter of a trust or several trusts in favour of the concessionaires and consignors who can therefore trace the money there as well as to the proceeds of the sale to Inview Sdn Bhd.

[12] Geh Cheng Hooi made clear that:

12.1 trusts can arise by operation of law, that is, either a resulting trust or constructive trust;

12.2 *the court needs to consider the relationship between the parties to determine whether there is a trust;*

12.3 *it is not necessary to have an express clause with the word trust* in it as long as the correspondence or agreement concerned manifest an intention to create a trust. (Emphasis added.)

[55] Furthermore, the factum that the then surviving mother relinquishing registered interest over the property does not at all disprove the existence of the trust. On the contrary, if their then surviving mother did not relinquish her claim over the property, then that insistence of her registered interest would in fact negate the existence of the trust. But that was not at all the case in the appeal before us. The then surviving mother proceeded to relinquish her claim in the reliance of and in the belief that her daughters would honour the trust created by her late husband and her children.

[56] In fact, if we were to go by the learned judge's logic on the supposed 'admission' via the placement of the documents in Part A, then the same logic should equally apply to fortify the defendants' case. It must be minded that the land title to the property (which bears endorsement of the transfers under the MOT), and the memorandum of charge to the third defendant bank were also classified as Part A documents ('defendants' documents'). Thus, by the same reasoning, the learned judge should have similarly found that the plaintiffs have admitted to the truth of their signing of the MOT and the valid creation of the charge under the trust. Thus, it is clear that the learned judge's simplistic evaluation of the documents and the defendants' documents (based on their classification) was unfortunately erroneous.

[57] Now, aside from the miniscule circumstantial evidence that the learned judge had considered, we have identified the other glaring direct and circumstantial evidence that the learned judge had failed to properly appreciate (which would have in fact proven the legitimacy of the signatures, the MOT, and the secret trust):

(a) the *direct evidence* that two independent witnesses (who had attested the MOT) had positively identified the plaintiffs' signatures and confirmed

the occurrence of the signature before them at their respective land offices;

(b) the circumstantial evidence that the other three signatories of the transfer (the first defendant, Suzie, and Lily) all supported the legitimacy of the MOT and the existence of the secret trust;

(c) the circumstantial evidence that for some unknown reason the plaintiffs refused to make Suzie and Lily (who were also party to the secret trust and MOT) as parties to the plaintiffs' suit;

(d) the circumstantial evidence that for some unknown reason that the plaintiffs refused to make DW6 as a party to the plaintiffs' suit despite DW6 being one of the brothers who bear witness to the signing of the impugned MOT which the plaintiffs claim to be fraudulent;

(e) the circumstantial evidence that for some unknown reason the plaintiffs refused to make other individuals who were 'accessories' to the alleged fraud as parties in the plaintiffs' suit;

(f) the circumstantial evidence that for some inexplicable reason the plaintiffs were arbitrarily selective in prosecuting their claims against the personas allegedly involved in the alleged fraud and forgeries;

(g) the circumstantial evidence that the legitimacy of the signatures, the signing of the MOT before the independent witnesses (DW2 and DW4) were corroborated by the testimonies of Suzie and Lily (who were also signatories of the transfer of their shares to the first defendant);

(h) the circumstantial evidence that the majority three out the five sisters (the first defendant, Suzie, and Lily) all without complaints or resistance selflessly and willingly set into motion the creation of the charge to the third defendant bank for the sake of monies to be given to their then surviving mother (and not for their own benefit);

(i) the circumstantial evidence that there was an unconscionably and inexplicably long delay of *22 years (from the initial equal 1/5th share ownership circa 1992) until the alleged 'discovery of fraud'* before the plaintiffs were 'reminded' of the rental income generated from the property (being a shophouse);

(j) the circumstantial evidence that there was an unconscionably and inexplicably long delay of *22 years (from the initial equal 1/5th share ownership circa 1992) until the alleged 'discovery of fraud'* that the plaintiffs never actively asserted their rights or portions to the rental income from the property;

(k) the circumstantial evidence that the plaintiffs never saw it proper to actively pursue the declassification and release of the chemist report from the police for almost a decade since their police report circa September 2014;

(l) the circumstantial evidence that DW2 (as a land office clerk in Kota Kinabalu) and DW4 (as a land office clerk in Tambunan) were independent witnesses who had no reasons to lie and had nothing to gain from the transfer of the siblings' shares to the first defendant;

(m) the circumstantial evidence that the plaintiffs had never tendered any medical evidence or expert evidence to prove that DW4's past head injuries and seizures would go as far as to impede DW4's memories and capacity to testify as an independent witness;

(n) the circumstantial evidence that the plaintiffs had never tendered any medical or expert evidence to prove that DW4's past head injuries and seizures would go as far as to impede DW4's positive identification of the first plaintiff's signature and the occurrence of the signing before him;

(o) the circumstantial evidence that for the past *22 years (from the initial equal 1/5th share ownership circa 1992) until the alleged 'discovery of fraud'*, the title over the property had always remained within the safekeeping and possession of the then surviving mother; and

(p) the circumstantial evidence that for the past nine years since the plaintiffs' police report, the police still had not taken any actions against the first defendant despite already having a chemist report in the police's possession.

[58] Now, even assuming the learned judge was right in disregarding DW2 and DW4's independent direct evidence (which was indeed wrong) there was already a torrent of circumstantial evidence as listed above that would have supported the fact that the trust indeed existed and that the MOT was valid as the plaintiffs indeed had signed the MOT.

[59] It was far too compelling for us to ignore the plethora of actions (as well as omissions) by the plaintiffs themselves, the police, the parties' mutual brother ('DW6'), the third defendant bank, the other signatories to the MOT (being Suzie and Lily), and the then surviving mother who have all admitted and proven (on the balance of the probabilities) that the transfer of all the five sisters' shares to the first defendant and the trust for the benefit of the then surviving mother was the ultimate truth of the matter.

[60] Even without the independent direct evidence by DW2 and DW4, it was clear that the circumstantial evidence was beyond compelling for us to

conclude that the plaintiffs' signature was indeed authentic and that the property indeed was held on trust for their then surviving mother.

[61] The fact that the plaintiffs had for years remained ignorant and nonchalant about their shares in the property (also the rental generated from the same property), was utterly indicative that the truth tilts in favour of the appellants' narrative that the property was held in trust for the benefit of the siblings' then surviving mother.

[62] It was outright unthinkable that the plaintiffs would 'sleep' on their rights over the rent generated from the property for so long that they had 'forgotten' this prime source of income that would prove to be very helpful to their financial woes.

[63] It is infinitely more probable than not that all the siblings from the outset understood that they held the property in trust for the sake of their then surviving mother. Following the same narrative, it is more probable than not that the siblings were all aware and were in unison to deal with their shares in accordance with the spirit of the trust (and have their shares transferred to the first defendant and later be charged to the bank to obtain monies for the sake of their then surviving mother). The fact that a large majority of the loan monies were credited into the then surviving mother's account lends further credence and legitimacy to the first defendants' narrative.

[64] Thus, it would be a grave injustice for us to now allow the plaintiffs to blow hot and cold and negate their prior admission as to the legitimacy of the MOT and the trust created for the benefit of their then surviving mother. The plaintiffs ought to be estopped from now denying the validity of the MOT, the charge, and the trust in favour of their then surviving mother.

[65] Suffice that we refer to the recent decision in *Marzida bt Mansor v Lembaga Kumpulan Wang Simpanan Pekerja* [2023] 4 MLJ 364 in which the *Court of Appeal* had restated the celebrated principle of estoppel against the unjust adoption of contradictory stances in a case:

> [53] The Federal Court's decision in the case of *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 has cautioned against such adoption of contradictory stances:
>
> > When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so'.lt would facilitate moral decadence within our social structure.

A [54] *Such approbating and reprobating of stances have also been cautioned against by the Court of Appeal in the case of Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761; [2012] 2 CLJ 16 which had held the following:

B In other words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v News (UK) Ltd and Others* [1990] 3 All ER 376 at pp 383–384: There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot C thereafter be permitted to go back and adopt an inconsistent stance.

[55] It would be severely remiss and unbecoming of this court to allow the appellant to renege against the position it had taken for the past 13 years.

D **[66]** Now, it is already clear that the learned judge had unduly preferred minute circumstantial evidence against a barrage of other critical circumstantial evidence which otherwise would have disproved the plaintiffs' claim. For the sake of completeness, we shall also briefly deal with the learned judge's erroneous disregard of direct evidence.

E

[67] DW2 and DW4 were land office clerks who attested the MOT. They stood to gain nothing at all from the transfer of the property. The reason the learned judge chose to disregard their independent testimony was because:

F (a) there were some discrepancies in DW4's testimony and that DW4's capacity was discredited as DW4 had seizures while testifying in court; and

(b) there were some discrepancies in DW2's testimony and it took extensive 'prodding' until DW2 'corrected' his testimony to give positive G identification of the plaintiffs' signatures.

[68] As against the discrediting of DW4, we must remark that there was no medical evidence tendered before the learned judge that the head injury H suffered by DW4 would go as far as to impede in DW4's memory. Without the aid of any medical report or expert testimony, it was far too presumptuous of the learned judge to medically decide on the quality and veracity of DW4's mind and testimony.

I **[69]** As against the discrediting of DW2, we are also minded that as at the time of testimony, DW2 was already at the old age of 70. It would be unjust for the learned judge to expect a perfect and solid testimony from a person of such elderly age. It would not even have been fair to expect the same from a spry young witness.

[70] We have here two independent witnesses that was either unwell or elderly. That be the case, it should have been prudent and fair for the learned judge to afford some margin of discrepancy and not strictly or simply discredit the independent witnesses' entire testimony.

[71] Although a smooth and seamless testimony is ideal, but reality of witness testimony rarely is ever ideal or perfect. The Federal Court had expressed the same sentiment on the realities of witness testimony in the case of *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15:

> *In my opinion discrepancies there will always be, because every witness does not remember the same thing and does not remember accurately every single thing that happened* ... I shall be most inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. *There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all*. A court is fully competent for good and cogent reasons, to accept one part of the testimony of a witness and reject the other. (Emphasis added.)

[72] We also refer to the Federal Court decision in *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 in which the Federal Court had mirrored the same sentiment:

> *Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies.* And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge. (Emphasis is added.)

[73] In any case, the testimony of witnesses must be tested against the contemporaneous evidence available in court. It should have been clear to the learned judge that (save for the limited circumstantial evidence relied upon by the learned judge) all other contemporaneous documents and surrounding facts and evidence would corroborate the narrative that the defendants' defence to be the solemn truth.

[74] The failure of the learned judge to test the independent witnesses' evidence against contemporaneous documents and surrounding evidence is in itself a failure of judicial appreciation into the evidence. We refer to a very recent *Court of Appeal* decision in *Choong Shin Cheong v Suruhanjaya Syarikat Malaysia & Anor* [2020] 5 MLJ 523:

> Regarding the necessity of testing the veracity of witnesses' testimony against the backdrop of contemporaneous documents in the face of conflicting evidence, *it was*

settled law that in cases where there was conflicting evidence, it was the duty of the court to not only weigh such evidence on a balance of probabilities but it also look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. (Emphasis added.)

[75] The fact that the learned judge was aware that DW2 was able to correct his testimony should be an indication to the learned judge that DW2 was still able to reconcile his memories and recollections regarding the signing of the MOT.

[76] Thus, since DW2 and DW4's direct evidence should have been considered, it naturally follows that that the learned judge had wrongfully preferred circumstantial evidence over direct evidence which was readily available in court. In fact, direct evidence as to signatures would prove to be even more probative than a handwriting expert. We refer to the Court of Appeal decision in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97:

It is a well-established general guide to the judicial appreciation of handwriting evidence that *where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document, then it is a safe course for a court to prefer the direct evidence.* Accordingly, the judge erred in not preferring the evidence of DW2 and DW3 to that of the handwriting experts (see pp 135I–136A, 137A–D, 138A); *Newton v Ricketts* [1861] 11 ER 731 followed. (Emphasis added)

[77] The Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 had similarly endorsed the Court of Appeal's decision to prefer and rely upon the testimonies of wholly disinterested witnesses:

Everything considered, we tend to agree with the observations expressed by the Court of Appeal in the following terms:

Once the evidence of DW2 and DW3 is carefully scrutinized and tested against the probabilities of the case*, it is apparent that they are wholly disinterested witnesses. Their evidence may be safely acted upon and ought to have been acted upon by the learned judicial commissioner. DW2 attended on the deceased, took his instructions, prepared a will in accordance with those instructions and attended to the execution and attestation of that will.* DW2 and DW3, testified that the deceased was entirely lucid and mentally alert both at the time of giving instructions and at the time of signing the will. We find no good reason for these two witnesses to have concocted their story as neither of them had anything to gain from doing so ... (Emphasis added.)

[78] In a similar manner, the learned judge should have preferred the independent direct evidence of the two disinterested witness over other miniscule circumstantial evidence she had erroneously preferred.

[79] All of the above (in this part) considered, we hereby answer *issue 1 in the NEGATIVE*. The learned judge was unfortunately wrong in finding that the plaintiffs have discharged their burden of proof (on the balance of probabilities) that they had never signed the MOT.

[80] It was also erroneous of the learned judge to find that the plaintiffs' shares on the property had been unlawfully transferred to the first defendant without the plaintiffs' knowledge by way of forged signatures. It was also wrong of the learned judge to find that the property was not held on trust for the benefit of the siblings' then surviving mother (now deceased).

Issue 2: Whether or not the learned judge was correct in finding that the third defendant bank was not a bona fide subsequent chargee for valuable consideration

[81] Considering our negative answer to issue 1, the entire question in issue 2 is already moot and academic. Since there was no forgery or fraud to impugn the MOT and transfer of the plaintiffs' shares to the first defendant, then there shall not be any impediment to the valid creation of the charge with the third defendant bank.

[82] Nonetheless, we do remark that considering the facts of the case, and the available information that the third defendant bank would have obtained from the searches it conducted, it would not have been clear to the third defendant bank that there might be any reason to go beyond the land title and the MOT.

[83] The learned judge found issue when the third defendant bank had approved the loan ahead of the registration of the MOT. Thus, supposedly, the loan was approved despite knowing that the shares in the property have yet to be transferred to the first defendant.

[84] On the contrary, it was also in evidence that the loan was granted with full disclosure of the impending transfers of all the 1/5 shares to the first defendant. Thus, it was not at all conspicuous that the approval of the loan was ahead of the registration of the MOT. The fact that both the MOT and the memorandum of charge was presented and registered at the same date of 22 August 2002 clearly proves that it was already within the third defendant bank's and all of the five siblings' contemplation that the transfer of their shares was designed to facilitate the granting the loan.

[85] It is uncommon that a person holding beneficial interest over a property (although yet to be transferred that property) would have sufficient beneficial rights to deal with such property even before the interest was registered onto the title. We need only refer to the Court of Appeal decision in *Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor* [2007] 1 MLJ 101:

> On the authority of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, even though on the date of execution of the 1989 agreement the second and third appellants did not have any registered right or interest in the subject land that does not render the agreement which is otherwise valid and enforceable to be void or invalid. The second and third appellants at the material time have sufficient interest in the subject land to enter into a binding agreement by which they agreed to transfer the subject land when the title or interest in the subject has been registered in their names. In other words the parties agreed that the agreement will only become enforceable the moment the second and third appellants' right or interest in the subject land is registered under the Ordinance.

(See also *Malayan Banking Bhd v Mohd Affandi bin Ahmad & Anor and another appeal* [2023] MLJU 2160.)

[86] The simultaneous presentation and registration of the MOT and memorandum of charge at the land office also proves that everything was above board. It is by no means uncommon for banks to approve loans ahead of time before actually registering the bank's interest onto the collateral. In fact, it was also prudent of all the siblings to obtain the approval of the loan so as to have certainty of the loan so that the entire exercise of transferring their shares to the first defendant was guaranteed to not be in vain.

[87] Therefore, we agree with the counsel for the third defendant bank that there was an absence of any adverse interest on the face of the land title and the MOT prior or during the registration of the transfer under the MOT. The same absence would also remain at the time the memorandum of charge was registered onto the title.

[88] In any case, it is already trite law that a chargee also falls within the class of 'subsequent purchasers' who would be afforded deferred indefeasibility of title over a property. Notwithstanding the existence of fraud in the prior immediate purchase, the third defendant bank as bona fide subsequent chargee shall enjoy deferred indefeasibility of title.

[89] We are conscious that there is no equivalent to s 340 of the National Land Code on indefeasibility in the Sabah Land Ordinance. Nevertheless, the reference to the *Federal Court* decision in *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank (M) Bhd and another appeal* [2021] 5 MLJ 759 is relevant to underscore the position of the third defendant bank as a bona fide purchaser:

> The COA was correct to find that, on the facts, UOB was a subsequent purchaser. Heveaplast became an immediate purchaser when it was registered as the owner of the land pursuant to SPA1. *In its capacity as immediate purchaser, Heveaplast created the UOB charges. Since a purchaser who acquired the interest from the immediate purchaser was a subsequent purchaser, it followed that UOB was a subsequent purchaser and the proviso to s 340(3) of the NLC applied.* It was then only necessary to ascertain if UOB was a bona fide purchaser for value. If it was not, then its interest in the land under the UOB charges was defeasible and liable to be set aside. (Emphasis added.)

[90] Therefore, the third defendant bank as subsequent chargee shall enjoy deferred indefeasibility and as there was no reason to believe that the third defendant bank had acted in bad faith, we accordingly do not find any reason to deprive the third defendant bank off of its deferred indefeasibility of title as subsequent chargee.

[91] Thus, we similarly answer *issue 2 in the NEGATIVE.* The learned judge was wrong to find that the third defendant bank was not a bona fide subsequent chargee enjoying deferred indefeasibility over the property.

OUR DECISION

[92] All of the above findings considered, we hereby allow both of the appeals (Appeals S-01(NCVC)(W)-379–08 of 2020 and S-01(NCVC)(W)-390–08 of 2020) and set aside the High Court order dated 17 July 2020. Therefore, the plaintiffs' claim against the defendants stands dismissed with costs.

[93] We also order that in respect of Appeal S-01(NCVC)(W)-390–08 of 2020) costs of RM70,000 here and below to be paid by the respondents to the appellant, subject to payment of allocatur. For Appeal S-01(NCVC)(W)-379–08 of 2020, we order that the first and second respondents to pay the appellant bank costs of RM30,000 here and below, subject to payment of allocatur.

Appeals allowed.

Reported by Nabilah Syahida Abdullah Salleh